TENAGA NASIONAL BHD v. ATA INDUSTRIAL (M) SDN BHD

HIGH COURT MALAYA, JOHOR BAHRU
CHOO KAH SING J
[CIVIL SUIT NO: JA-22NCVC-210-10-2017]
25 NOVEMBER 2018

UTILITIES: *Electricity – Tampering of meter – Discovery of extra cables from transformer rooms to main switch boards that do not pass through electricity meters – Actual consumption of electricity not accurately recorded by meters – Whether owner of premises caused tampering of meters – Whether owner of premises constructed cables at transformer rooms without knowledge of electricity supplier – Whether owner of premises had means to carry out installation of extra cables without first switching off supply of electricity – Whether owner of premises had access to electricity substation – Whether calculation for back charges correct – Whether limitation set in – Whether doctrine of ex turpi causa non oritur actio applicable – Electricity Supply Act 1990, s. 38(3)*

LIMITATION: *Cause of action – Accrual – Discovery of tampering of electricity meter – Claim for losses of revenue suffered by electricity supplier – Whether limitation has set in when electricity supplier commenced action – When cause of action accrued – Whether calculation of losses and back charges correct*

During a visit to two premises, the plaintiff's representatives discovered that the electricity meters installed at both premises had been tampered with. There were extra cables which were connected from the transformer rooms to the main switchboards without passing through the electricity meters which meant that the actual consumption of the electricity would not be accurately recorded by the meters. The plaintiff claimed to have suffered an estimated total loss of RM5,089,623.63 ('the loss amount') for the two premises for the period between 1 March 2009 and 20 February 2014. The plaintiff commenced the present claim, pursuant to s. 38(3) of the Electricity Supply Act 1990 ('the Act') for its loss of revenue for the supply of electricity to the defendant due to meter-tampering which was allegedly caused by the defendant and/or its agent. Resisting the plaintiff's claim, the defendant argued that (i) the two Tenaga Nasional Bhd ('TNB') accounts for the two premises did not belong to the defendant; (ii) it was impossible that the defendant could have caused the tampering of the meters or could have constructed the cables at the transformer rooms without the plaintiff's knowledge as (a) only the plaintiff's employee(s) had the keys to the locked transformer rooms; and (b) the defendant did not have the means to carry out the installation of the extra cables without first switching off the supply of electricity to the two premises. The switching off of the supply of electricity to the two premises could only be done from a TNB substation which was

located outside the two premises. The TNB substation was under the care and control of the plaintiff's employee(s); (iii) the defendant could not be liable because the plaintiff's employee(s) came to inspect the two premises some time in 2011 and they did not find any tampering at that time; (iv) the back charged period calculated from 1 March 2009 could not be correct; (v) the plaintiff filed the present claim on 3 October 2017 and, as such, the plaintiff's claim would be time-barred under the Limitation Act 1953 if the breach was alleged to have occurred on 1 March 2009; and (vi) the plaintiff's claim ought to be precluded by the doctrine of *ex turpi causa non oritur actio* ('the doctrine'). In the event the plaintiff was able to prove that the defendant was liable for tampering of the meters, the defendant challenged the estimated loss amount and submitted that it was wrong and arbitrary as the loss amount did not take into account the period during which there were no manufacturing activities at the two premises as until 2013, they were merely used as a warehouse.

Held (dismissing claim with costs):

(1) The photographs tendered by the plaintiff evidently showed extra cables were installed at the transformers in the transformer rooms and connected to a foreign switchboard bypassing the meters. The documentary evidence vividly showed tampering was committed at the two premises. Notwithstanding the finding of tampering at the two premises, the tampering could not have been committed by the defendant's representatives and/or its agents alone without any assistance being offered by the plaintiff's employee(s) and/or agents. (paras 27 & 28)

(2) The extra cables, which were fixed or connected to the transformers in the transformer rooms, were conspicuously large in size. One could not miss or overlook that the extra cables were connected to the transformers. Anyone from TNB, with electrical or technical knowledge, who has been trained by TNB would have noticed the extra cables when they visited or inspected the transformer rooms in the past. The plaintiff's evidence was that the extra cables were only noticed on 20 February 2014. The extra cables could not have been installed just before 20 February 2014 because those cables were carefully and neatly positioned and ran through the ground in the transformer room, from one end and came out to another end, connecting to the external main switchboard. This meant that the extra cables appeared to have been installed and constructed during the time of construction of the premises. When the plaintiff's employee(s) came to the premises to carry out the commissioning test on the transformer at the premises, the plaintiff's employee(s) ought to have noticed the extra cables then. (para 29)

(3) In the event the extra cables were installed after the commissioning of the transformer, in order to connect the extra cables to the transformers, the supply of the electricity has to be shut down completely by TNB. Electricity supply to the transformer room could only be shut down completely through a TNB substation outside the premises and that TNB substation is located some distance away from the premises. The TNB substation was, and still is, in full control of the plaintiff's employee(s) and/or agents. (para 30)

(4) The keys to the transformer rooms were kept at all times by the plaintiff's employee(s). Even if the defendant's representatives could unlock the transformer rooms, the defendant's representative(s) could not connect the extra cables to the transformer if the electricity supply is not shut down. Only the plaintiff's employee(s) could shut down the electricity supply. The extra cables were meant for high voltage and only a highly qualified electrician and/or electrical engineers could perform the task of connecting the cables to the transformer. Both the transformer rooms and the TNB substation were under the control of the plaintiff's employee(s). As such, the defendant's representatives could not have committed such an elaborate illegal act without the help of the plaintiff's employee(s). The irresistible inference from the circumstances would be that the plaintiff's employee(s) must have acted in cahoots with the defendant in committing the tampering/illegal act. (paras 31 & 32)

(5) The plaintiff's claim was based on a statutory right established under the Act. The doctrine could not apply. The object of the plaintiff and the defendant in entering into the agreement was, at the first place, not intended to carry out any illegal act; neither would the performance of the contract contravene any law in the country. Although in the midst of performing the contract, an illegal act was committed by the plaintiff's employee(s), the doctrine or the defence of illegality would not automatically avail to the defendant's defence. The commission of the illegal act by the defendant in cahoots with the plaintiff's employee(s) was in fact a breach of the contract on the defendant's part. The plaintiff had, under no circumstances, condoned to the participation of its employee(s) in the illegal act. It was the plaintiff's employee(s) who, on his own volition and frolic, had acted in cahoots with the defendant. It would be unjust to put the responsibility for every action of its employee(s) acting outside his/her scope of works on the plaintiff. (paras 37-39)

(6) The plaintiff failed to plead unjust enrichment in its statement of claim and therefore, could not rely on the principle of unjust enrichment. The plaintiff based its claim solely on s. 38(3) of the Act. The law requires that the employee or authorised person of the plaintiff to certify the

contents of the written statement. This requirement was to show that the contents, particularly the amount of the loss of revenue, calculated based on the method adopted by the plaintiff, were true and correct. The plaintiff's witness ('PW13') did not state clearly that the contents have been certified as true and correct. PW13 merely signed off the notices without declaring that the contents had been certified as true and correct. By failing to certify, it was possible he signed without checking the contents, especially the method of calculation and the amount claimed as true and correct. Based on the evidence of PW13 and the two defective written statements, the plaintiff's claim ought to fail *in limine* for non-compliance with s. 38(4) of the Act. (paras 41, 45, 46 & 48)

(7) The plaintiff claimed for the loss of revenue for the period from 1 March 2009 till 20 February 2014. However, the action was taken out only on October 2017. If the plaintiff took 1 March 2009 as the starting point of time the breach occurred, the limitation would set in on 2 March 2015. The plaintiff did not explain as to why its claim was filed only in October 2017. The plaintiff also did not explain as to why it took the period between 1 March 2009 and 20 February 2014 as the back charges period for its estimated loss of revenue. The period taken by the plaintiff for back charges, as its loss of revenue, was rather arbitrary. Furthermore, the plaintiff's method of calculation, and the manner in which it derived the amount as the estimated loss amount, was grossly unjust and arbitrary. (paras 49, 50 & 53)

Case(s) referred to:
Patel v. Mirza [2016] UKSC 42 ***(refd)***
Tenaga Nasional Bhd v. Ichi-Ban Plastic (M) Sdn Bhd & Other Appeals [2018] 3 CLJ 557 FC ***(refd)***

Legislation referred to:
Electricity Supply Act 1990, s. 38(3), (4)

Criminal Justice Act 1993 [UK], s. 52

For the plaintiff - Izatulina Jamaluddin & Amierul Sharafi; M/s Othman Hashim & Co
For the defendant - GK Sritharan & Sivasangker; M/s GK Sritharan & Co

Reported by Najib Tamby

JUDGMENT

Choo Kah Sing J:

Introduction

[1] The plaintiff's (TNB's) claim is based on s. 38(3) of the Electricity Supply Act 1990 (hereinafter 'the Act') for its loss of revenue for the supply of electricity to the defendant due to meter tampering which was allegedly caused by the defendant and/or its agent. The plaintiff's claim is not based on breach of contract or tort.

[2] The parties have gone through a full trial. On 30 September 2018, this court dismissed the plaintiff's claim based on its peculiar facts. The reasons for the decision are set down as below.

Background Facts

Plaintiff's Case

[3] On 20 February 2014, the plaintiff averred that its representatives went to two premises, namely, Nos. 7 (hereinafter 'property No. 7') and 18 (hereinafter 'property No. 18') both of Jalan Hasil 1, Kawasan Perindustrian Tampoi, 81200 Johor Bahru, Johor.

[4] During the visit to the two premises, the plaintiff's representatives discovered that the electricity meters installed at both the premises had been tampered with. They discovered that there were extra cables which connect directly from the transformer rooms to the main switchboards without passing through the electricity meters. In other words, the actual consumption of the electricity would not be accurately recorded by the meters at both premises.

[5] As a result, the plaintiff, based on its estimated calculation, had suffered a total loss of an estimated value of RM5,089,623.63 (hereinafter 'the loss amount') for the two premises for the period between 1 March 2009 and 20 February 2014.

[6] The estimated loss amount for both premises is tabulated as below:

Property No. 7	A/c: 0340 0052 5554 01	RM2,423,666.58
Property No. 18	A/c: 0340 0029 7345 01	RM2,665,957.05
Total:		RM5,089,623.63

Defendant's Case

[7] The defendant contended that the two TNB's accounts for the two premises do not belong to the defendant. They belong to a company known as Jabco Filter System Sdn Bhd (hereinafter 'Jabco Filter'), and that the two premises bear a postal address as Nos 7 and 9, Jalan Hasil 1, Kawasan Perindustrian Jalan Hasil, Tampoi, 81200 Johor Bahru, Johor, not Nos. 7 and 18 as claimed by the plaintiff.

[8] The defendant also contended that its representative(s) and/or agent(s) did not tamper with the TNB's meters and/or had any knowledge of the tampering of the meters, including the installation of the extra cables at the transformer rooms which bypassed the meters and connected directly to the main switchboards. The defendant averred that it was impossible that the defendant's representative(s) and/or agent(s) could have caused the

tampering of the meters or could have constructed the cables at the transformer rooms without the plaintiff's employee's knowledge. The defendant alluded two reasons, firstly, only the plaintiff's employee(s) has the keys to the locked transformer rooms. Secondly, the defendant did not have the means to carry out the installation of the extra cables without first switching off the supply of electricity to the two premises. The switching off of the supply of electricity to the two premises could only be done from a TNB substation which is located outside the two premises. The TNB substation was at all material times under the care and control of the plaintiff's employees.

[9] The defendant further contended that it could not be liable because the plaintiff's employee(s) came to inspect the two premises sometime around 2011 as there were several complaints made to TNB that the supply of electricity to the two premises was frequently interrupted, and the plaintiff's employee(s) did not find any tampering at that time. This means the back charged period calculated from 1 March 2009 could not be correct. If the tampering was committed as early as in 2009, the plaintiff's employee(s) would have discovered it on 2011 when the plaintiff's employee(s) carried out the inspection at that material time.

[10] The defendant averred that the plaintiff filed the suit on 3 October 2017, as such the plaintiff's claim would be time-barred under the Limitation Act 1953 if the breach was alleged to have had occurred on 1 March 2009.

[11] In the event the plaintiff was able to prove that the defendant was liable for the tampering of the meters, the defendant then challenged the estimated loss amount. The defendant contended that the calculation by the plaintiff was wrong and arbitrary, particularly it did not take into account the period during which there were no manufacturing activities at the two premises until 2013, they were used merely as a warehouse. The consumption of electricity could not be that high as claimed by the plaintiff in its estimated loss of revenue.

The Findings Of This Court

The Two Accounts

[12] The defendant contended that the two accounts, namely, A/c: 0340 0052 5554 01 (property No. 7) and A/c: 0340 0029 7345 01 (property No. 18) do not belong to the defendant.

[13] During the trial, the plaintiff adduced two documents to prove the accounts belonged to the defendant, and the documents were marked as exhs. 'J1' and 'J2'.

Account for Property No. 7

[14] Exhibit J1 is a contract document entered into between the plaintiff and the defendant, and it was dated 3 April 1998. The premises where the plaintiff was supposed to supply the electricity to was property No. 7. The account number of the customer (which is the defendant) was '525554'. Based on the plaintiff's monthly invoices (see examples pp. 45-50 of exh. 1A) addressed to the defendant, the account number of the customer is stated as '0340 00525554 01'. The underscore reflects the same customer account number as in exh. J1. Hence, the current monthly invoices do reflect the contract entered into between the plaintiff and defendant. Clearly, the account number '0340 00525554 01' belonged to the defendant for the property No. 7 despite the fact the premises was occupied by Jacob Filters.

Account For Property No. 18

[15] Exhibit J2 is also a contract document entered into between the plaintiff and defendant, and it was dated 8 March 1996. The place where the plaintiff was supposed to supply the electricity was stated as No. 9, Jalan Hasil 1, Kawasan Perindustrian Tebrau. The customer account number was stated as '6002029203 and the contract number was stated as '9607907'.

[16] Upon close examination of the plaintiff's monthly invoices (see examples pp. 99-104) to the defendant, the invoices stated clearly the contract number is '09607907' which matches the one stated in exh. J2. Based on the invoices, electricity was supplied to the premises at No. 9. However, the glaring discrepancy is that the billing address of the invoices was addressed to property No. 18, instead of premises No. 9.

[17] During the inspection which took place on 20 February 2014, the plaintiff's employees actually went to premises bearing a postal address No. 9, instead of No. 18 of Jalan Hasil 1, Kawasan Perindustrian Tampoi, 81200 Johor Bahru, Johor. The plaintiff did not provide explanation to the court as to why the plaintiff's employees ended up at No. 9 premises despite the fact that the billing address and the place of inspection were supposed to be premises No. 18 (or property No. 18).

[18] The plaintiff's counsel submitted that the premises' number had changed due to changes in the TNB's system. This submission did not make sense. The plaintiff is a utility company, it could not simply change the customer's address, unless the plaintiff had made a mistake in its records, but that was not alluded by the plaintiff.

[19] This court observes that the plaintiff's employees stated the address for the place of inspection was property No. 18, but it actually took place at premises No. 9. This is evidenced from the photographs tendered by the plaintiff (see pp. 57-58 exh. 1A). The 'Maklumat Jangka' slip in the

photograph stated that the address as '18, Jln Hasil 1 ...', but the inspection actually took place at premises No. 9. This is inconsistent evidence from the plaintiff. No evidence was adduced to explain the discrepancy.

[20] With regard to the submission that the meter serial number '28502423' was supposed to be installed at property No. 18, and that meter was found at premises No. 9, as such, property No. 18 is premises No. 9, the submission is untenable. There is no evidence to suggest that the plaintiff's employees had actually gone to premises No. 9 to install the meter bearing the serial number '28502423' when it was supposed to be installed at property 18.

[21] The fact that the meter bearing the serial number '28502423' was found at premises 9 could not prove that premises 9 was meant to be the same premises as property 18. The recording of the serial number of the meter on the 'Maklumat Jangka' slip could not provide any valuable information, because the information of the serial number of the meter could be filled on the 'Maklumat Jangka' slip on the spot upon checking the meter which was already fixed at the premises No. 9. There is no conclusive evidence adduced by the plaintiff to show that the particular meter bearing the serial number '0340 00525554 01' was in fact fixed at premises No. 9.

[22] The plaintiff's evidence referring to the particular meter installed at premises No. 9 which it claimed to be the same as property No. 18 which belonged to the defendant's account is questionable.

[23] Further, the plaintiff's monthly invoices which were addressed to property No. 18 did not state what the serial number of the meter is. The contents of the invoices merely state the contract number which is the same as stated in exh. J2.

[24] This court is baffled with another piece of plaintiff's evidence. As mentioned earlier, the contract number in exh. J2 and the monthly invoices is the same. However, it is observed that the customer account number 6002029205 stated in exh. J2 is different from the monthly invoices. The customer account number in the monthly invoices was stated as 0340 00297345 01. Why was there a difference? The plaintiff did not provide satisfactory explanation as to why there was a difference between exh. J2 and the monthly invoices in relation to the customer account number.

[25] Based on the above, this court finds the claim for the loss of revenue against the defendant for the customer account at property 18 is tainted with uncertainty.

[26] Notwithstanding what was found by this court, this court is equally baffled as to why the defendant did not protest the monthly invoices it had received all those years or attempt to seek clarification from the plaintiff, and why the defendant had paid the monthly invoices although they were addressed to property 18.

Tampering

[27] On the issue of tampering, based on the evidence adduced by the plaintiff in court, especially the evidence of PW3 and PW7, the evidence clearly revealed and explained as to how the record of the consumption of electricity in both the premises had been compromised. The photographs (see pp. 13-24 and 64-77 exh. '1A') tendered by the plaintiff evidently show extra cables were installed at the transformers in the transformer rooms and connected to a foreign switchboard bypassing the meters. This court does not intend to regurgitate the plaintiff's evidence here. The documentary evidence vividly shows tampering was committed at both the premises.

[28] Notwithstanding the finding of tampering at both premises, this court is of the view the tampering could not have been committed by the defendant's representative(s) and/or its agents alone without any assistance being offered by the plaintiff's employee(s) and/or its agent(s).

[29] First, the extra cables which were fixed or connected to the transformers in the transformer rooms were conspicuously large in size. One could not miss or overlook that extra cables were connected to the transformers. Anyone from TNB with electrical or technical knowledge who has been trained by TNB would have noticed the extra cables when they visited or inspected the transformer rooms in the past. The plaintiff's evidence was the extra cables were only noticed on 20 February 2014. The extra cables could not have been installed just before 20 February 2014 because those cables were carefully and neatly positioned and ran through the ground in the transformer room from one end and came out to another end connecting to the external main switchboard. This means the extra cables appear to have been installed and constructed during the time of construction of the premises. When the plaintiff's employees came to the premises to carry out commissioning test on the transformer at the premises, the plaintiff's employees ought to have noticed the extra cables then. Why was there no complaint about the extra cables that were illegally connected to the transformers then?

[30] Secondly, in the event the extra cables were installed after commissioning of the transformer, this court accepts the defendant's submission that in order to connect the extra cables to the transformers, the supply of the electricity has to be shut down completely by TNB. Electricity supply to the transformer room could only be shut down completely through

a TNB substation outside the premises, and that TNB substation is located some distance away from the premises. The TNB substation was and still is in full control of the plaintiff's employees and/or agent(s). Someone from TNB must have acted in concert with the defendant to shut down the power supply to the premises from the TNB substation to allow the extra cables to be connected to the transformers in the premises. This must have had happened at some point in time after the commissioning of the transformer.

[31] Thirdly, the keys to the transformer rooms were kept at all times by the plaintiff's employees. Even if the defendant's representative(s) could unlock the transformer rooms, the defendant's representative could not connect the extra cables to the transformer if the electricity supply is not shut down. Only the plaintiff's employees could shut down the electricity supply as alluded above. Those extra cables were meant for high voltage, and only highly qualified electrician and/or electrical engineers could perform the task of connecting the cables to the transformer. Both the transformer rooms and the TNB substation were at all material times under the control of the plaintiff's employees. As such, the defendant's representative(s) could not have committed such an elaborate illegal act without the plaintiff's employee(s) help.

[32] Hence, the irresistible inference from the circumstances would be the plaintiff's employee(s) must have acted in cahoots with the defendant in committing the tampering/illegal act.

[33] The defendant's counsel submitted that the doctrine of *ex turpi causa non oritur actio* (from a dishonourable cause an action does not arise) should avail to its defence, since the plaintiff's employee(s) was part of the illegal act, the plaintiff ought to be vicariously liable for the actions committed by its own employee(s) and/or representative(s) and/or agent(s). Hence, the plaintiff could not enforce its claim which based on an illegal act which the plaintiff had participated in it through its own employee(s). The plaintiff's claim ought to be precluded by the doctrine of *ex turpi causa non oritur actio*.

[34] The application of the doctrine of *ex turpi causa* was recently examined in the Supreme Court of England in *Patel v. Mirza* [2016] UKSC 42. In this case, Mr Patel paid a sum of £620,000 to Mr Mirza to place a bet on a particular company's shares on the basis of an insider information. In England, it is an offence to use advance insider information to profit from trading in securities, as it contravenes s. 52 of the Criminal Justice Act 1993. Hence, Mr Patel and Mr Mirza had entered into an illegal agreement to use the money for the purpose of "insider dealing". The insider information was not forthcoming and it was a mistake, and Mr Mirza did not place the bet. Mr Patel then requested his money back, but Mr Mirza refused to return the

money. Mr Patel then sued Mr Mirza for the return of his money. Mr Mirza pleaded *ex turpi causa* as his defence claiming that the agreement they entered into was an illegal agreement, therefore, Mr Patel's claim ought to be precluded by the principle of *ex turpi causa non oritur actio*.

[35] On the application of the doctrine *ex turpi causa*, Lord Toulson has this to say:

> [101] … I would say that one cannot judge whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system, without a) considering the underlying purpose of the prohibition which has been transgressed, b) considering conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality. We are, after all, in the area of public policy. That trio of necessary considerations can be found in the case law.

[36] The Supreme Court of England rejected Mr Mirza's defence and relied on the principle of unjust enrichment to allow Mr Patel's claim. His Lordship Toulson has this to say:

> [121] A claimant, such as Mr Patel, who satisfied the ordinary requirements of a claim for unjust enrichment, should not be debarred from enforcing his claim by reason only of the fact that the money which he seeks to recover was paid for an unlawful purpose. There may be rare cases where for some particular reason the enforcement of such a claim might be regarded as undermining the integrity of the justice system, but there are no such circumstances in this case. I would dismiss the appeal.

[37] In our present case, this court is of the considered view that the doctrine could not apply. The object of the plaintiff and defendant in entering into the agreement was, at the first place, not intended to carry out any illegal act neither would the performance of the contract contravene any law in the country.

[38] Although in the midst of performing the contract, an illegal act was committed by the plaintiff's employee(s), the doctrine *ex turpi causa* or the defence of illegality would not automatically avail to the defendant's defence. This is because the commission of the illegal act by the defendant in cahoots with the plaintiff's employee(s) was in fact a breach of the contract on the defendant's part. The plaintiff had under no circumstances condoned its employee's participation in the illegal act. It was the plaintiff's employee(s) who on his own volition and own frolic acted in cahoots with the defendant. It would be unjust to put the responsibility for every action of its employees acting outside of his/her scope of works on the plaintiff.

[39] The plaintiff's claim is based on a statutory right established under the Act. Hence, there is no issue whether the enforcement of the plaintiff's claim might be regarded as undermining the integrity of the justice system or otherwise. The doctrine *ex turpi causa* could not lend a hand to the defendant in this instance.

[40] Notwithstanding what is said above, this court is still not satisfied that the plaintiff's case has been proved on a balance of probabilities. This court is troubled by the serious discrepancy in the plaintiff's evidence relating to the inspection carried out on 20 February 2014 at premises No. 9 when supposed to be at property No. 18, and the plaintiff's failure to explain how the tampering could be carried out by the defendant alone without the plaintiff's employee(s) and/or agent(s) having participated in it.

Plaintiff's Claim Is Based Only On s. 38(3) Of The Act

[41] The defendant's counsel submitted that the plaintiff failed to plead unjust enrichment in its statement of claim and the plaintiff based its claim solely on s. 38(3) of the Act. This court agrees with the defendant's counsel's submission. Hence, the plaintiff could not rely on the principle of unjust enrichment.

[42] The defendant's counsel further submitted that since the plaintiff's claim is based solely on s. 38(3) of the Act, therefore, its claim must satisfy the requirements as stated under the Act.

[43] The defendant's counsel averred that the plaintiff must first prove that there was a written statement stating the amount of loss of revenue and that statement is a *prima facie* evidence of its losses. In order to rely on the *prima facie* evidence, the statement must be issued in compliance with s. 38(4) of the Act. The defendant's counsel relied on the Federal Court decision of *Tenaga Nasional Bhd v. Ichi-Ban Plastic (M) Sdn Bhd & Other Appeals* [2018] 3 CLJ 557, wherein the apex court has laid down the requirements as follows:

> [62] For a written statement to have the effect of a *prima facie* evidence, it must be issued in compliance with the requirement of s. 38(4) of the Act. In *Tenaga Nasional Berhad v. Dunia Raya Enterprise Sdn Bhd (supra)* the Court of Appeal, at p. 757, held that for TNB to rely on a written statement, the following must have taken place:
>
> (i) The appellant must have calculated the loss of revenue and reduce it into a document and written statement;
>
> (ii) an employee and/or duly authorised person of the appellant must have perused the document as well as the written statement to certify the written statement;
>
> (iii) the certified written statement must contain the particulars stated in s. 38(4) of ESA 1990;

(iv) for a valid certificate, the name of the employee or authorised person of the appellant must appear in the statement and duly signed;

(v) if a proper certified statement is issued, it needs to be served on the customer and if the customer does not pay, then civil action can be taken. Thus, it is a condition precedent for initiation of civil action in reliance of s. 38 for Tenaga to issue a certified written statement according to law, before civil action can be commenced;

(vi) …

[44] The defendant's counsel complained that the plaintiff failed to comply with s. 38(4) of the Act, particularly in reference to the word "certified". The two written statements issued by the plaintiff's witness Mohd Latif bin Md Kadir (PW13) both dated 26 July 2016 (for properties 7 and 18 respectively) (see pp. 40-42 and 94-96 exh. '1A') did not expressly state that he certified the contents of the letters as true and correct.

[45] The law requires that the employee or authorised person of the plaintiff to certify the contents of the written statement. This requirement is to ensure that the contents, particularly the amount of the loss of revenue calculated based on the method adopted by the plaintiff, are true and correct. This is vital because the written statement is a *prima facie* evidence of a debt owing. Once a proper statement has been issued and properly served, then the burden would shift to the defendant/customer to rebut the presumption. Hence, before the written statement is issued, the contents, especially the method adopted for the calculation has to be certified as true and correct. The plaintiff has a statutory duty to discharge that burden, otherwise, the presumption of *prima facie* evidence would be abused.

[46] In the present case, the plaintiff's witness PW13 did not state clearly that the contents have been certified as true and correct, he merely signed off the notices without declaring that the contents had been certified as true and correct. By failing to certify, it is possible he signed without checking the contents, especially the method of calculation and the amount claimed as true and correct. One of the written statements was issued to the wrong address, this itself would render the statement as questionable (see p. 94 exh. '1A'). An uncertainty arises with regard to the inspection of the meter which was installed at the property in question – was it the meter installed at property 18 or 9?

[47] The defendant's counsel also complained that PW13 who issued the written statements had, in cross-examination, stated that he did not have any personal knowledge of the calculation and the method of calculation adopted in the written statements. This clearly shows that he did not "certify" the contents as true and correct as it is required by the law.

[48] Based on the evidence of PW13 and the two defective written statements, the plaintiff's claim ought to fail *in limine* for non-compliance with s. 38(4) of the Act.

Limitation

[49] On the issue of limitation, the plaintiff claimed the loss of revenue for the period from 1 March 2009 to 20 February 2014. However, the action was taken out only on October 2017. If the plaintiff took 1 March 2009 as the starting point of time the breach occurred, then the limitation would set in on 2 March 2015. The plaintiff did not explain as to why its claim was filed only in October 2017.

Claim For Loss Of Revenue – Unjust And Arbitrary

[50] The plaintiff also did not explain as to why it took the period between 1 March 2009 to 20 February 2014 as the back charges period for its estimated loss of revenue. The period taken by the plaintiff for back charges as its loss of revenue was rather arbitrary.

[51] The defendant also complained that the plaintiff's witness Amarishwari Balakrishnan Naidu (PW10) took the period for the calculation of the loss of revenue did not take into consideration that both the premises were used as a warehouse and that there were no machines operating on the premises prior to 2013. As such, the usage of electricity could not be that high as estimated. PW10 told the court that she was not aware of the fact the premises were used as warehouse prior to 2013. She merely obtained the information from the technical team and input the data into the system using the averaging method to calculate the estimated loss amount. The defendant's witness Nazri bin Mohd Nasir (DW6) from Jabatan Keselamatan Dan Kesihatan Pekerja, Johor, testified that he came to inspect the premises on 22 January 2013 to register the machines that were installed at the premises. Prior to the date, there was no machine registered, said DW6. DW6's evidence was not discredited. DW6's evidence supported the averment of the defendant that there were not any machines operating at the premises before 2013. This court accepts DW6's evidence as credible, therefore, the period taken by the plaintiff to back charge its loss of revenue starting from 1 March 2009 would be unjust and arbitrary.

[52] The plaintiff took the average period between 1 November 2014 and 1 April 2015 as the basis of calculation for the average usage of the electricity. The question arises as to why the plaintiff took the highest average months as the basis of calculation for the average usage of the electricity? The bar-chart adduced by the plaintiff at p. 39 of exh. A1 (for property 7) depicts the period between 1 May 2014 and 1 November 2014 was at the lower average after the meter was rectified on 20 February 2014.

Why didn't the plaintiff take the lower average period for its calculation for the average usage, instead of taking the higher average period? As the plaintiff took the higher average period as its basis of calculation for the average without justification, its action is indeed unjust and arbitrary.

[53] The same approach was applied by the plaintiff to property No. 18 (or premises No. 9) (see p. 93 of exh. 'A1'). The higher average period was between 1 November 2014 and 1 April 2015 which was used by the plaintiff for the average usage amount; the plaintiff did not take into account the lower average period between 1 March 2014 and 1 October 2014. If the plaintiff had used the lower average period as its basis of calculation for the average usage, the resulting figure would be vastly different from the figure the plaintiff has asserted was its loss. If the plaintiff had taken a longer period as its basis for calculation for the average usage, the result would also be very different. For example, if the plaintiff had taken the usage from 1 March 2014 to 1 April 2015, the result could be half of the amount that the plaintiff is claiming in this action. Hence, this court finds that the plaintiff's method of calculation and the manner in which it derived the amount as the estimated loss amount was grossly unjust and arbitrary.

[54] Based on the above submissions of the defendant, and based on the findings of this court, this court is satisfied that the defendant has successfully defended the plaintiff's claim.

[55] The court has also considered the other complaints raised by the defendant's counsel in his submissions which are not stated in this judgment. The court did not deal with these complaints in this judgment because the court is of the opinion that the earlier complaints are sufficient for this court to dismiss the plaintiff's claim, especially the complaint that the plaintiff failed to comply with the statutory requirements under s. 38(4) of the Act – that PW13, the authorised person, had failed to certify and had no personal knowledge of the contents in the written statements as true and correct. On this point alone, the plaintiff's case which based on s. 38(3) of the Act must fail.

Conclusion

[56] Based on the above finding, this court dismissed the plaintiff's claim and ordered the plaintiff to pay costs of RM30,000 to the defendant.